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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RENEY VICTOR JOHNSON, Defendant and Appellant.	B297152 (Los Angeles County Super. Ct. No. MA074721)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Daviann L. Mitchell, Judge. Affirmed.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Michael R. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Reney Victor Johnson guilty of attempted robbery and the trial court sentenced him to three years in prison. On appeal, defendant contends that: the trial court erred by failing, sua sponte, to order a hearing on defendant's eligibility for a mental health diversion program under Penal Code section 1001.36[1] or, in the alternative, his counsel was ineffective in failing to request such a hearing; the court failed to instruct the jury on the elements of a lesser included offense; the prosecutor engaged in misconduct during argument; the court's instructional error and the prosecutor's misconduct constituted cumulative error; and the trial court abused its discretion by finding he had the ability to pay certain fines, fees, and assessments. We affirm.

II. FACTUAL BACKGROUND

A. *Prosecution's Case*

On September 16, 2018, at around 3:00 p.m., defendant walked into the Luxor Market located in Lake Los Angeles. Defendant, who was "a regular" customer, entered the stock room. An employee signaled to another employee, Victor Garcia, "to go to the stock[]room." As Garcia approached, he saw that defendant was holding a crucifix. Defendant told Garcia, "'You're the Devil. You're the Devil.'" Defendant said "a lot of [other] things" that Garcia did not understand. When defendant touched

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1 All further statutory references are to the Penal Code.

Garcia's hand, Garcia told him to leave. Defendant then grabbed two containers of orange juice and left the store without paying for them.[2]

At around 5:00 p.m. the same day, defendant returned to the store. Defendant picked up three orange juice containers and went to the front of the store, near the register. He placed the containers in a box and walked toward Garcia, who stood by the entrance to the cashier's station. Garcia told defendant that he could not leave the store without paying. Defendant responded, "'Fuck it. I'm not going to pay.'" As Garcia crossed his arms to block defendant's path, defendant pushed him. Defendant then hit Garcia two or three times and the two men tumbled onto a rack of chips. Garcia suffered injuries to his arm and a cut to his head. Defendant left the store and a store employee called the police.

A Los Angeles County Sheriff's Deputy responded to the 911 call and arrested defendant across the street from the market as he was standing behind his car. At the time of his arrest, defendant had $0.37 on his person and a wallet that contained debit or credit cards. The deputy did not try to determine whether there were any funds available on the cards.

B. *Defense Case*

Defendant did not call any witnesses on his behalf. In closing argument, defendant argued that, as reflected by his behavior at the market that day, he was delirious at the time of the second incident and therefore could not have formed the

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[2] Although evidence of this conduct was introduced at trial, it did not form the basis for the single charge in the information.

requisite intent to permanently deprive Garcia of the store property.

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant with attempted second degree robbery in violation of sections 664 and 211. Following trial, the jury found defendant guilty as charged. The trial court sentenced defendant to an upper term of three years and also imposed certain fines, fees, and assessments, as discussed below.

IV. DISCUSSION

A. *Mental Health Diversion*

1. Background

During the proceedings, the trial court and defense counsel discussed the issue of defendant's mental health on a number of occasions.

Prior to trial, during a discussion of plea negotiations, the trial court observed: "It does appear to me that [defendant's] behavior may be consistent with someone [who is] struggling either with addiction issues, whether it be alcohol or drugs or some mental health component. That [is] kind of how it reads." The court also suggested that, "if there [was] some, maybe, mental health component to this [incident]," the District Attorney might be willing to reconsider a prior offer. But the court concluded that, even if defendant "may have [had] some mental

health challenges or some other issues milling about," it would not "really warrant [a] low . . . or even midterm" sentence following a conviction.

During a pretrial hearing on the prosecution's motion to exclude evidence of defendant's conduct during the first uncharged incident at the market, the trial court addressed defense counsel's opposition, explaining, "[I]n this case, you're asking for jury nullification as I see it, and that's what you're saying is the fairness factor[, the fact] that [defendant] has some issues whether it's addiction issues, mental health issues, [or] a combination of both. He's dual diagnosis. I don't know. But . . . a mental health professional would be required to come forward and testify about [defendant's] ability to form the intent. A [percipient witness] cannot say[,] even if he was high, even if he [did] have mental health problems, [whether] that would affect his ability to form the specific intent required here."

Defense counsel responded: "I can represent to the court that I am not putting on a mental health defense. I'm not going to sit there and say . . . [defendant] has . . . schizophrenia, and he was acting consistent with his [mental disorder]—he was having a schizophrenic episode. I'm not going to make that argument. I'm not putting on a mental health defense."

Later during that same argument, defense counsel reiterated that, "I can represent to the court that I'm not going to put on a mental health defense where I'm going to say he was not able to formulate the intent because he was schizophrenic or he's bipolar or anything like that. I'm certainly not going to do that. [¶] But I think that what his behavior was during the two incidents and whether it's deemed weird or not weird or

whatever, it's still behavior that would give us a glimpse into whether or not [defendant] had the requisite intent."

In defendant's sentencing memorandum, defense counsel wrote, "While there was no evidence that [defendant] suffered from a mental health condition that contributed to his conduct, it does appear that he was not in his right state of mind."

During the initial sentencing hearing, defense counsel advised the trial court that he had received an e-mail from a psychiatric social worker describing the mental health services that would be available to defendant if he were granted probation.[3] Later in the hearing, defense counsel advised the court that early in the proceedings, defendant was "evaluated for competence purposes," but counsel was uncertain whether the expert "addressed any other mental health issues. [Counsel believed] it was just an evaluation for competency purposes."

Prior to continuing the initial sentencing hearing, the trial court expressed its tentative views on sentencing, observing, among other things, that, "Clearly, for years, [defendant] suffered from alcohol issues. And I don't know whether it's . . . a combination of that with mental health issues. I see that [defendant has] been through an outpatient program. I don't know what kind of outpatient program. It doesn't say. The court then explained that it was not inclined to grant probation, but continued sentencing to allow defense counsel to provide additional information.

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[3] Although the supplemental reporter's transcript of the initial sentencing hearing suggests that the social worker's e-mail was placed in the court file, there are no psychiatric social worker e-mails or reports in the trial court file.

At the beginning of the continued sentencing hearing, the trial court acknowledged that "defense [counsel] is trying to look into some mental health treatment" as a condition of probation. The court later noted, however, that it did not "find this [was] an unusual case. [D]efendant may have some mental health challenges but not to the level in any way, shape, or form that would warrant the conduct on this occasion." The court ultimately concluded that "[i]t appears evident . . . defendant has an alcohol issue, arguably a drug issue, and probably on many levels some mental health challenges. However, it doesn't justify [defendant's] behavior under these circumstances." The court therefore denied defendant's request for probation and imposed sentence.

2. Mental Health Diversion Statute: Section 1001.36

Section 1001.36 authorizes a pretrial diversion program for defendants with qualifying mental disorders. "As originally enacted, section 1001.36 provided that a trial court may grant pretrial diversion if it finds all of the following: (1) the defendant suffers from a qualifying mental disorder; (2) the disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to mental health treatment; (4) the defendant consents to diversion and waives his or her speedy trial right; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Former § 1001.36, subd. (b)(1)–(6).) Section 1001.36 was subsequently amended by Senate Bill No. 215 (2017–2018 Reg. Sess.) (Senate Bill 215) to specify that defendants charged with

certain crimes, such as murder and rape, are ineligible for diversion. (§ 1001.36, subd. (b)(2), as amended by Stats. 2018, ch. 1005, § 1.)

"If the defendant makes a prima facie showing that he or she meets all of the threshold eligibility requirements and the defendant and the offense are suitable for diversion, and the trial court is satisfied that the recommended program of mental health treatment will meet the specialized mental health treatment needs of the defendant, then the court may grant pretrial diversion. (§ 1001.36, subds. (a), (b)(3) & (c)(1).) The maximum period of diversion is two years. (*Id.*, subd. (c)(3).) If the defendant is subsequently charged with an additional crime, or otherwise performs unsatisfactorily in the assigned program, then the court may reinstate criminal proceedings. (*Id.*, subd. (d).) 'If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion' and 'the arrest upon which the diversion was based shall be deemed never to have occurred.' (*Id.*, subd. (e).)" (*People v. Frahs* (June 18, 2020, S252220) ___ Cal.5th ___ [2020 WL 3429139] (*Frahs*).)

3. Analysis

Section 1001.36 became effective on June 27, 2018. (Stats. 2018, ch. 34, § 24.) Defendant was arraigned on the information four months later on October 24, 2018. Trial commenced on December 17, 2018. At no time did defendant request that the trial court consider him for pretrial diversion pursuant to section

1001.36. Defendant's failure to do so would ordinarily forfeit his argument on appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Carmony* (2004) 33 Cal.4th 367, 375–376.)

Defendant nonetheless seeks to avoid the forfeiture doctrine by contending that the trial court had a sua sponte duty to hold a hearing on defendant's eligibility for pretrial mental health diversion. According to defendant, because the trial court was aware of defendant's mental health issues, but failed to hold a hearing, he is entitled to a conditional reversal and remand to allow the court to determine his eligibility for mental health diversion. The Attorney General counters that absent a request for pretrial diversion, a court is not required, sua sponte, to consider a defendant's eligibility for diversion under section 1001.36.

Even assuming, without deciding, that a court, under certain circumstances, has a sua sponte duty to hold a mental health diversion eligibility hearing, defendant has failed to demonstrate that the trial court here was obliged to conduct any such hearing. Contrary to defendant's assertion, the record in this case does not affirmatively disclose that he meets the first threshold eligibility requirement for such diversion, namely, that he suffers from a qualifying mental disorder. At best, the record suggests that defendant may have had unspecified mental health "issues," but it does not contain any expert evaluation showing that he had been diagnosed as suffering from one of the specified mental disorders that would qualify him for diversion.

Indeed, the record contains affirmative representations by defense counsel that defendant did not suffer from a qualifying disorder. During the pretrial hearing on the prosecution's motion to exclude evidence, defense counsel twice assured the trial court

that defendant would not be asserting a mental health defense based on schizophrenia, bipolar disorder, "or anything like that," thereby tacitly admitting that the facts known to counsel did not support such a defense. Further, in defendant's sentencing memorandum, counsel unequivocally conceded that "there was no evidence that [defendant] suffered from a mental health condition that contributed to his conduct . . . ." And, at the sentencing hearing, counsel advised the trial court that, early in the proceeding, defendant had been evaluated for purposes of a competency hearing, but counsel was not aware of any other mental health evaluation.

Thus, on these facts, the court was not required, sua sponte, to conduct a hearing on defendant's eligibility for pretrial diversion. (Cf. *Frahs, supra*, ___ Cal.5th ___ [2020 WL 3429139] [finding that a conditional limited remand was appropriate "when, as here, the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion—the defendant suffers from a qualifying mental disorder"].)

B. *Ineffective Assistance of Counsel*

Defendant argues that, if the trial court did not have a sua sponte duty to hold a mental health diversion hearing under section 1001.36, then he received ineffective assistance of counsel. According to defendant, given the record of his apparent mental health issues, no reasonable attorney in his trial counsel's position would have failed to request a mental health diversion eligibility hearing.

1. Legal Principles

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th. 986, 1009.)

2. Analysis

Defendant cannot demonstrate that counsel's failure to request an eligibility hearing fell below an objective standard of reasonableness. The record in this case suggests that there was a reasonable tactical purpose for counsel's failure to act. For

instance, the facts known to counsel prior to trial may not have supported a request for pretrial diversion. By the time of the prosecution's motion to exclude evidence, trial counsel had apparently determined that there was an insufficient factual basis to support a mental health defense. He therefore could reasonably have concluded that there was an insufficient factual basis to assert that defendant suffered from a qualifying mental disorder under section 1001.36.

Further, trial counsel may have been apprised that defendant did not want to participate in a diversion program that could have taken two years to complete, when he faced an upper term sentence of three years, and by the time of his sentencing hearing, he had 400 days of custody credit and the potential for additional postsentence custody credits (§§ 4019, 2933, 2933.1). Defendant may have preferred to serve a relatively short sentence rather than participate in a diversion program, which included the potential for the reinstatement of the criminal proceeding.

Because this record does not demonstrate that trial counsel's performance was deficient, we reject defendant's claim of ineffective assistance on appeal.

C. *Instructional Error*

Defendant next contends that the trial court committed instructional error when it instructed the jury on the lesser included offense of attempted petty theft because it failed to instruct on the elements of that offense.

1. Background

On the charged crime of attempted robbery, the trial court first instructed the jury using CALCRIM No. 460. The trial court modified the standard attempt instruction by inserting the word "robbery" in the blank spaces that called for the identification of the target offense.[4] The court then instructed the jury on the

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[4] The trial court's version of CALCRIM No. 460 read: "The defendant is charged with attempt[ed] robbery. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing robbery; [¶] AND [¶] 2. The defendant intended to commit robbery. [¶] A *direct step* requires more than mere[ly] planning or preparing to commit robbery or obtaining or arranging for something needed to commit robbery. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit robbery. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit robbery is guilty of attempted robbery even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step towards committing robbery, then that person is not guilty of attempted robbery. [¶] To decide whether the defendant intended to commit robbery, please refer to the separate instructions I will give you on that crime." (Italics added.)

elements of robbery, using CALCRIM No. 1600.[5]

The court next instructed the jury using CALCRIM No. 3517, the pattern instruction defining lesser included offenses generally. In pertinent part, that instruction advised the jurors as follows: "A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] *Attempt*[*ed*] *petty theft is a lesser crime of attempt*[*ed*] *robbery charged in count 1*. [¶] It is up to you to decide the order in which you

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[5] The version of CALCRIM No. 1600 given by the trial court read: "The defendant is charged with robbery in violation of . . . section 211. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his or her immediate presence; [¶] 4. The property was taken against the person's will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 6. When the defendant used force or fear to take the property, he intended to deprive the owner of the property permanently. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form the required intent until after using the force or fear, then he did not commit robbery. [¶] If you find the defendant guilty of robbery, it is robbery of the second degree. [¶] A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short. [¶] The property taken can be of any value[,] however slight. [¶] A person does not have to actually hold or touch something to possess it. It is enough if a person has the right to control it[,] either personally or through another person. [¶] A store employee who is on duty has possession of the store owner's property. [¶] '*Fear*[,]' as used here[,] means fear of injury to the person himself or herself." (Italics added.)

consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." (Italics added.)

The trial court then immediately instructed the jury on the elements of petty theft, using CALCRIM No. 1800.[6] The court did not, however, repeat the definition of an attempted crime in CALCRIM No. 460 as it related to petty theft. In other words, it did not repeat CALCRIM No. 460, replacing "robbery" with "petty theft."

2. Legal Principles

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the

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[6] The version of CALCRIM No. 1800 read: "To prove the defendant is guilty of petty theft in violation of . . . section 484, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's or owner's agent's consent; [¶] 3. When the defendant took the property, he intended to deprive the owner of it permanently; [¶] AND [¶] 4. The defendant moved the property, even a small distance, and kept it for any period of time[,] however brief. [¶] An agent is someone to whom the owner has given complete or partial authority and control over the owner's property. [¶] For petty theft, the property taken can be of any value[,] no matter how slight."

court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531 . . . .) That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present (see, e.g., *People v. Hood* (1969) 1 Cal.3d 444 . . .) . . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

We will assume for purposes of this opinion that the trial court erred in failing to repeat CALCRIM No. 460 for attempted petty theft. We nonetheless conclude that any such error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) ""In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."' (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338 . . . .)" (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1172.)

Here, the trial court instructed the jury on the elements of attempted robbery, namely, that the People must prove that: "defendant took a direct but ineffective step towards committing robbery;" and "[t]he defendant intended to commit robbery." The court also advised the jury that attempted petty theft was a lesser included offense of attempted robbery, the sole charge in the information. Further, the court provided the jury with verdict forms on the greater crime of attempted robbery and the lesser crime of attempted petty theft. The court never instructed the jury that defendant was charged with completed petty theft or that completed petty theft was a lesser offense of attempted robbery.

On this record, we conclude the jury must have reasonably understood that the elements of attempted petty theft included "a direct but ineffective step toward committing petty theft," the elements of which crime were provided to the jury, and an "intent[ ] to commit petty theft." Thus, any error in failing to instruct the jury was harmless beyond a reasonable doubt. (*People v. Lynch* (2010) 50 Cal.4th 693, 763, abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 637 [finding that trial court's failure to instruct jury on the definition of "attempt" was harmless and noting that CALJIC No. 6.00 "'merely restates the common meaning of "attempt"'"]; *People v. Cain* (1995) 10 Cal.4th 1, 44 [court's error in failing to instruct jurors on the elements of attempt was harmless where court instructed jury on the elements of an attempted rape special circumstance and on the elements of rape].)

D. *Prosecutorial Misconduct*

Defendant claims that the prosecutor engaged in prejudicial misconduct when, during argument, he made an appeal for sympathy for the victim by telling the jury that Garcia "deserve[d] justice."

1. Background

Prior to closing argument, the trial court instructed the jury that if the court sustained an objection, the jury "must ignore the question." The court also instructed the jury to "not le[t] bias, sympathy, prejudice, or public opinion influence your decision." Further, the court advised the jury, "You must follow

the law as I explain it to you even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

In his rebuttal argument, the prosecutor made the following comments concerning the reasonable doubt instruction: "Reasonable doubt. You have the instruction. I can't make it any better. It is what it is. So I'm going to ask you to read it, and remember what reasonable doubt is not. It's not a hundred percent proof, hundred percent certain, beyond a shadow of a doubt. The best way I can explain it is it's a long-lasting belief that the defendant is guilty of the things he's charged with, and he is, and *Mr. Garcia deserves justice for having been assaulted and robbed at the Luxor Market that day*." (Italics added.)

In response, defense counsel objected that the comment constituted "[i]mproper argument," and the trial court sustained the objection. But defense counsel did not request a curative instruction, an admonition, or otherwise suggest that the comment was so inherently inflammatory or prejudicial that it would taint the outcome of the jury's deliberations.

Following the verdict, defense counsel filed a motion for new trial, arguing that the prosecutor's comment during rebuttal constituted misconduct because it "appealed to the juror[s'] emotion by seeking to indulge [their] natural sympathy for the victim."

The trial court denied the motion for new trial, reasoning as follows: "[W]hen the prosecution made the comment, 'Mr. Garcia deserves justice for having been assaulted and robbed at the Luxor Market that day,' I did sustain that objection. I thought it was an improper argument. However, the court recognizes the standard by which the court [must] evaluate the

motion for new trial based on prosecutorial misconduct. [¶] In citing [*People v. Panah* (2005) 35 Cal.4th 395, 462], the court notes that 'prosecutorial misconduct involves the use of deceptive and reprehensible methods to persuade the trial court or the jury.' [¶] In this case I don't think it even comes close to rising to that level. I don't think, as the defense argued, that this invoked the golden rule such that [it] would require the jury to walk in . . . the victim's shoes or imagine what the victim would have suffered. He made a comment about the victim deserving justice, but it was in [the] context [of explaining the reasonable doubt standard] . . . . [¶] . . . [¶] I sustained the objection at that point. [¶] And I believe that the emphasis was that [the jury was] to follow the standard and explanation. This was a passing comment. I don't feel based on everything that was presented to me, the conduct of the prosecutor throughout the proceeding was that he was in any way intending to be deceptive, and his conduct in no way in this court's opinion was reprehensible nor was he using those methods to persuade the jury to decide this case based on emotion. [¶] The court [must] consider everything in totality. And as I've indicated, I don't believe that this had any impact at all on the jury. It was just one small portion. I did sustain that objection. I'm presuming that the jury heard that objection sustained and did not consider it."

2. Analysis

As an initial matter, we could conclude that by failing to request an admonition or curative instruction, defendant forfeited the misconduct argument on appeal. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328 ["It is well settled that

making a timely and specific objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal"].)

But even if we were to consider defendant's argument on its merits, we would reject it. """A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""" ([*People v. Powell* (2018) 6 Cal.5th 136], 172.)" (*People v. Hoyt* (2020) 8 Cal.5th 892, 943.)

Here, the challenged comment by the prosecutor was isolated, and the trial court sustained the immediate objection to it. In addition, as explained above, the jury had been instructed not to allow sympathy to influence its decision, to instead decide the case solely on the evidence, and not to consider the comments of counsel as evidence, instructions that we presume the jury understood and followed in reaching its verdict. Under these circumstances, we conclude that the prosecutor's comment was not so significant that it denied defendant a fair trial or otherwise constituted the type of deceptive or reprehensible conduct that would warrant reversal.[7]

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[7] For this reason, we reject defendant's claim that defense counsel provided ineffective assistance by failing to request a curative instruction, as defendant cannot show that, but for

E. *Cumulative Error*

Defendant contends that even if either the claimed instructional error or the alleged misconduct was not, by itself, sufficiently prejudicial to warrant reversal, the cumulative effect of the prejudice from that error and subsequent misconduct requires reversal. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) We conclude that the assumed instructional error and error in the prosecution's argument were harmless, even accumulated. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

F. *Ability to Pay Fines and Fees*

Defendant contends that the trial court abused its discretion when it found that defendant had the ability to pay the fines, fees, and assessments imposed. According to defendant, the court's ability-to-pay finding was irrational and arbitrary because there was no evidence supporting it and because it was contradicted by "extensive facts" showing that defendant was indigent.

1. Background

During argument at the sentencing hearing, prior to pronouncing the sentence in this case, the trial court observed,

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counsel's failure to request a curative instruction, the outcome of the trial would have been different.

"To rebut some of the things [defense counsel] said when [he] talked about the defendant's stealing for necessities of life, as [counsel] might recall, the people in the store indicated [defendant] was a regular there because he was receiving money orders on a routine basis; so [it] appears that he had money. [¶] Furthermore, he had a car, and that's where he was located at the time of the arrest. So he had the money to buy a car.[8]"

Following argument, the trial court denied probation and sentenced defendant to the upper term of three years. The court also imposed a $900 restitution fine; a $900 parole revocation fine (which was stayed pending revocation of parole); a $30 criminal conviction fee; a $40 court security fee; and a $10 crime prevention fine, plus penalty assessments. Defense counsel did not object to the fines, fees, and assessments at the time the court imposed them in this case.

The trial court then considered sentencing in an unrelated misdemeanor case (number 6AN07056) in which probation had been revoked based on the filing of this felony case. The court denied reinstatement of probation, sentenced defendant in that misdemeanor case, and then imposed $235 in fees. At that point, defense counsel inquired, "Can the court just waive the fees?" In response, the court and counsel engaged in the following exchange: "The Court: No, but I can—I have no reason to—I

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8 The probation report indicated that defendant regularly came to the market to receive money orders, but there was no admissible trial testimony on this point. Further, there was evidence that defendant was arrested near his car and that an unrelated misdemeanor case in which he was also sentenced involved a charge of driving without a valid license, but there was no evidence that defendant owned a car.

mean, he gets money orders and checks. He has a car. So he has the ability to pay that. [¶] Do you want me to give him— [¶] . . . [¶] What would you like? I can give him a date out, give him plenty of time to pay it. If he doesn't pay it, he can ask for an extension or send it to collections. I'm hoping he'll be able to pay it when he gets out. [¶] [Defense Counsel]: He said he'll pay it when he gets out—if [he] makes it out. [¶] The Court: All right. [¶] Fines and fees will be due in 18 months on [September 28, 2020], and that will be in the clerk's office. That's $235 is what he owes. That will take care of that case. So that's—other than the fines and fees."

2. Forfeiture

The Attorney General asserts that defendant forfeited his challenge to the trial court's ability-to-pay finding by failing to object to it, citing *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. McCullough* (2013) 56 Cal.4th 589, 597; *People v. Avila* (2009) 46 Cal.4th 680, 729; and *People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) We agree.

Defendant initially failed to object to the trial court's imposition of the challenged fines, fees, and assessments imposed in this case. And, even assuming counsel's subsequent request to "waive" the fees in the misdemeanor case constituted a specific objection that defendant lacked the ability to pay any of the amounts imposed by the court in either case, the trial court then proceeded to make an ability-to-pay finding. Defense counsel did not object to the court's finding, challenge its reasoning, or offer any evidence to contradict that finding. Instead, counsel affirmatively indicated that defendant would pay the fees when

he was released. On these facts, we conclude that defendant forfeited his challenge to the trial court's ability-to-pay finding.

V. CONCLUSION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.